KHOO AH IMM & ORS.

v.

DATUK BANDAR KUALA LUMPUR & ANOR.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-236-97]
28 MAY 1997

CIVIL PROCEDURE: *Locus standi - Certorari - Whether appellants had locus standi to receive remedy of certiorari - Whether appellants victims of procedural unfairness*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Grant of - Whether discretionary - Alternative remedy - Whether there existed an equally efficacious remedy to protect appellants' rights*

The appellants are the owners and occupiers of several apartments in a condominium. The second respondent is the developer of the firstrespondent's land which is located below the appellants' condominium. When planning approval was granted in December 1994, the appellants were unhappy and applied to quash the decision. In August 1995 before the commencement of the construction a Settlement Agreement was reached between the appellants and the second respondent and a consent order was entered into between the parties in respect of matters of the Settlement Agreement in September 1995. When signs of physical strain were seen on the apartments of the appellants after earthworks began, the first respondent issued a Stop Work Order in February 1996 after the appellants wrote to the first respondent. But this order was partially removed by the first respondent in May 1996 and the appellants successfully applied for a stay of the work on the project in June 1996. The second respondent intervened in this application and the stay was discharged in December 1996. The first respondent then made an order rescinding the Stop Work Order issued in February 1996. The appellants filed an application for stay which was dismissed on the ground that the appellants had no *locus standi* to receive the remedy of *certiorari* that they had asked for. The appellants appealed.

Held:
Per Gopal Sri Ram JCA

[1] The Settlement Agreement had laid down sufficient protection for the appellants' rights. As it were, the appellants had entered into a consent order in respect thereof.

[2] The harm caused to the appellants' apartments were caused by the piling work which was nearly over and it would be manifestly unjust to quash the decision to rescind the Stop work Order.

[3] Application for *certiorari* is a discretionary remedy and is not a matter of right. The appellants were not without any remedy and their private law remedy was far more efficacious and will produce the result which they desired

[Appeal dismissed. Findings of trial Judge confirmed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Locus standi - Certiorari - Samada perayu mempunyai locus standi untuk menerima remedi certiorari - Samada mereka merupakan mangsa ketidakadilan prosedur*

UNDANG-UNDANG PENTADBIRAN: *Remedi - Certiorari - Pemberian remedi - Samada bergantung kepada budibicara - Remedi alternatif - Samada terdapat remedi alternatif yang setanding kesannya untuk melindungi hak perayu*

Perayu adalah tuanpunya dan penghuni beberapa apartmen dalam sebuah kondominium. Responden kedua ialah pemaju tanah kepunyaan responden pertama. Tanah tersebut terletak di bahagian bawah kondominium perayu. Bila kelulusan perancangan diberi pada Disember 1994, perayu tidak puas dan telah memohon untuk membatalkan keputusan tersebut. Pada bulan Ogos 1995, sebelum pembinaan dimulakan, sebuah Perjanjian Penyelesaian telah dicapai antara perayu dan responden kedua dan perintah persetujuan telah dimasukkan antara pihak-pihak tersebut mengenai hal-hal dalam Perjanjian Penyelesaian pada September 1995. Bila tanda ketegangan fizikal terlihat atas apartmen perayu selepas bemulanya kerja tanah, responden pertama telah mengeluarkan Perintah Henti Kerja pada Februari 1996 selepas perayu menulis kepada responden pertama. Akan tetapi perintah ini telah sebahagiannya di luputkan oleh responden pertama pada Mei 1996 dan perayu teah berjaya memohon untuk penggantungan kerja projek pada Jun 1996. Responden kedua telah

mencelah dalam permohonan ini dan penggantungan tersebut telah dilepaskan pada Disember 1996. Responden pertama kemudiannya membuat peintah membatalkan Perintah Henti Kerja yang dikeluarkan pada Februari 1996. Perayu telah memfailkan permohonan untuk penggantungan yang telah di tolak atas alasan bahawa perayu tidak mempunyai *locus standi* untuk menerima remedi *certiorari* sepertimana yang dipohon mereka. Perayu telah merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perjanjian Penyelesaian telah mengawal dengan secukupnya akan hak-hak perayu. Sebagaimana halnya, satu perintah persetujuan telah dimeterai oleh perayu berhubung dokumen tersebut.

[2] Kerosakan ke atas apartmen perayu adalah disebabkan oleh kerja-kerja piling yang sudah pun hampir siap. Oleh yang demikian ianya adalah amat tidak adil untuk mengenepikan keputusan untuk membatalkan Perintah Henti Kerja.

[3] Permohonan untuk *certiorari* bukanlah berasaskan hak dan Hakim yang arif adalah betul dalam menolak permohonan ini atas dasar perayu tiada *locus standi.*

[Rayuan ditolak. Keputusan Hakim pembicaraan disahkan.]

Cases referred to:
Smith & Others v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***
Government of Malaysia & Anor. v. Jagdis Singh [1987] 1 CLJ 451 ***(refd)***
Jai Singh v. Union of India AIR *[1977] SC 898* ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor. [1996] 4 CLJ 687 ***(refd)***

Legislation referred to:
Street, Drainage and Building Act 1974, s. 70A(4)

Other sources referred to:
Writ Remedies, Banerjee, 1995 Edn., p. 113
Administrative Law, Craig, 3rd Edn., p. 596

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R2-25-14-97]

For the appellants - Sulaiman Abdullah (S Selvarajah & Derek Fernandez with him); M/s. Fernandez & Selvarajah
For the 1st respondent - Tommy Thomas (Nallini Pathmanathan & Asmet Nasruddin with him); M/s. Skrine & Co.
For the 2nd respondent - Cecil Abraham (Dhinesh Bhaskaran & TP Ling with him); M/s. Che Mokhtar & Co.

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JUDGMENT

Gopal Sri Ram JCA:

On Monday, 26 May 1997, this Court was moved on an urgent basis for a stay of an order made by the first respondent, the Datuk Bandar of Kuala b Lumpur, rescinding a stop work order issued by him on 18 December 1996. We heard and dismissed the application for stay, but in view of the nature of the case came to the conclusion that an early and expedited hearing of the appeal proper would be the most appropriate step to take to have this matter resolved. Accordingly with the consent of Counsel, we directed the affidavits c filed in the motion for stay to stand as the record of appeal, with liberty to file an additional volume if the need arose. The President of this Court then directed this appeal to be heard today. These are the circumstances in which we come to hear this appeal.

The facts and background relevant to the appeal may be shortly stated. d

The appellants before us are the owners and occupiers of several apartments in a condominium called Faber Indah. It is located in Taman Desa, off Jalan Kelang Lama. There is a land below the appellants' condominium. It belongs to the first respondent. By a joint venture agreement dated 16 May 1992, the e first respondent and the second respondent agreed to develop the first respondent's land. For convenience I will call it "the subject property."

The whole of the construction and other ancillary matters pertaining to the development of the subject property were left in the hands of the second respondent. Planning approval for the project was given on 8 December 1994. f The appellants were dissatisfied with that decision of the first respondent. They took steps to question it. They filed an Originating Motion No. R3-25-6-95 seeking to quash that decision. That application came up for hearing before Azmel J but was compromised. On 17 August 1995, a settlement agreement was drawn up between the appellants and the second respondent.

g When the application was initiated, the only respondent to it was the first respondent. Later, the second respondent intervened and was added as a party. Hence the settlement agreement between the appellants and the second respondent.

h On 29 September 1995, a consent order was entered into between the parties. That order, among other things, provides for liberty to apply in general terms for directions and orders in respect of matters pertaining to the settlement agreement.

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Following this, the second respondent took possession of the site and commenced earthworks. Piling was involved. Somewhere along the way, when piling works were in progress, the apartments of the appellants began to show signs of physical strain. Cracks began to appear and there was subsidence resulting in a difference in the floor levels.

The appellants were naturally apprehensive. They wrote to the solicitors of the first respondent and copied that letter to the Ministry of Housing and Local Government. This was on 2 February 1996. That letter produced an immediate effect. For on 17 February 1996 the first respondent issued what is commonly known as a stop work order. In doing this, he exercised his powers under s. 70A(4) of the Street, Drainage and Building Act 1974 ('the Act'). That provision reads as follows:

> (4) The local authority may, where it certifies that the safety of life or property is affected or is likely to be affected by any earthworks, order the immediate cessation of the whole or any part of the earthworks; the certificate of the local authority under this subsection shall be conclusive proof of the matters stated therein and shall not be questioned or be subject to any appeal or review in any Court.

Later, two meetings took place between the engineers of the first respondent and the second respondent and an independent consultant employed by the latter. At the second of these meetings, at least one of the appellants was present. The impression that the appellants gained from these meetings, as now contended, is that they would be consulted on the issue of their safety from time to time by the first respondent before he exercised any of his powers under s. 70A of the Act. This did not happen.

Instead, on 16 May 1996 the first respondent issued an order partially removing the restraints imposed by the stop work order. The appellants being dissatisfied with this decision filed their second application on 27 June 1996.

This second application came up for hearing before Abdul Kadir Sulaiman J, who, after hearing arguments, granted a stay, the effect of which was to stop all work on the project. Later, the second respondent intervened in the application (it not having been made a party) and successfully applied to have the stay discharged. That order was made on 12 December 1996. Six days later, that is to say on 18 December 1996, the first respondent made an order rescinding in toto the stop work order issued on 17 February 1996. Against that decision, a challenge was taken in the instant proceedings.

This third Originating Motion came up for hearing before Azmel J for leave on 6 February 1997. He granted leave, and a stay on 17 March 1997. The substantive motion came up before him on 27 March 1997 and it was argued

over a number of days. His decision was pronounced on 5 May 1997. He dismissed the substantive motion, we are advised, principally on the ground that the appellants had no *locus standi* to receive the remedy they had asked for. The present appeal is directed against this decision.

Before us, Haji Sulaiman has submitted that his clients have substantive *locus standi*, that is to say, the right to receive the remedy of *certiorari*, because they are victims of procedural unfairness. He has argued that despite the silence in the statutory provision, namely, s. 70A of the Act, his clients nevertheless have the right to receive procedural fairness because of the circumstances of this case. He has drawn to our attention the fact that the first respondent had entered upon the scene by issuing a stop work order and by consulting his clients thereafter.

In response to questions from the Bench, Haji Sulaiman has frankly stated that the object he seeks to achieve is not merely to quash the order of the first respondent rescinding the stop work order in toto and thereby bringing work to a halt, but to permit the work to go on with his clients being given an opportunity to be consulted. He has also said that an independent consultant such as the one earlier employed by the second respondent could be found to provide technical input for the maintenance of the safety of life and property of his clients.

In opposing the appeal Mr. Thomas has argued that to accord procedural fairness on the present facts would constitute such a restraint upon the decision-making power of the first respondent as to delay an already delayed on going project. He says that one ought to look at the practical realities before injecting the doctrine of procedural fairness or legitimate expectation in a given case.

The burden of his submission, if I may summarise it, is this. The object of the doctrine of procedural fairness and that of legitimate expectation to receive such fairness to ensure that a fair and just decision is arrived at, forms part of the proposition that administrative decision-makers are under a duty to act fairly. His submission is that if the consequence of injecting either doctrine is to produce a burdensome or unjust result, the doctrines should be withheld from application.

Mr. Thomas has also argued that there is sufficient protection within the sphere of private law for the instant appellants, a point taken up and argued in greater detail by Mr. Abraham, of Counsel for the second respondent. And it is to his submissions that I now turn.

Mr. Abraham has taken us through the relevant provisions of the Act and the by-laws made under it in order to demonstrate the strict supervision imposed on consultants employed by a developer of a project. Mr. Abraham has submitted that on the facts of this case there is sufficient alternative remedy equally efficacious to protect the appellants' rights and to remedy their grievance. The gist of his submission is that in the exercise of discretion, the remedy of *certiorari* ought not to be granted in this case.

Now it is well settled that *certiorari* is one of those remedies in public law which cannot be claimed *ex debito justitiae,* but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case. For example, an applicant for *certiorari* who is able to establish that a wrong has been done him in public law may be denied relief on the ground that the public interest outweighs his grievance. See, *Smith and Others v. Inner London Education Authority* [1978] 1 All ER 411. The factors which a Court may take into account when denying relief are so numerous and so variable that it is unwise and impossible to list them out.

One of the grounds on which the remedy of *certiorari* may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum. Sometimes the alternative remedy is given by statute. See, *Government of Malaysia & Anor. v. Jagdis Singh* [1987] 1 CLJ 451.

But I am unaware of any proposition that enjoins the Court to decline *certiorari* solely on the ground that it must be statute that provides the alternative remedy. Neither has our attention been drawn to any authority which suggests the existence of such a proposition.

True, as pointed out by Haji Sulaiman of Counsel for the appellants, that in the vast majority of cases the alternative remedy on the basis of which relief has been refused was a statutory right of appeal. But there is at least one case in which relief was denied because it could be equally obtained by way of suit. See, *Jai Singh v. Union of India* AIR [1977] SC 898. In that case Khanna J delivering the judgment of the Indian Supreme Court held that the suit filed by the appellant before bringing his writ petition for *certiorari* ought to be pursued and for that reason upheld the dismissal of the application in public law. No doubt in that case the appellant had instituted an action and then moved for *certiorari*. But I do not think that the principle would be any different if the right to file a suit was available but no suit had yet been instituted.

In the present case, the settlement agreement contains cl. 2.1 which provides as follows:

> 2.1 FU (the second respondent) hereby guarantees that the construction and development of Danau Idaman Condominium (Phase 2B) will not affect the structural safety of Faber Indah Condominium and/or the safety of its residents and their property.

As can be seen, the second respondent by this clause has guaranteed the safety of the appellants in no uncertain terms. Any danger to their life, limb or property would squarely come within the purview of this clause.

When they filed the first application which was compromised, it was open to the appellants to have pursued this remedy to conclusion. They chose not to do so. They elected, in no uncertain terms, to place the burden squarely on the shoulders of the second respondent to warrant their safety. In addition, they reserved unto themselves under the terms of the consent order earlier referred to the right to approach the Court in the working out of the settlement agreement. The question is: Is this a sufficient protection of their rights? In my judgment the answer must be in the affirmative.

As I observed earlier, this is an on-going project in respect of which different kinds of work are bound to occur from time to time. The appellants do not deny the second respondent the right to carry on with the project. All that they are concerned about is damage to their property and injury to themselves. According to Mr. Abraham, about 84% of the piling work has been completed. There have been advance sales of the units to be constructed to innocent third party purchasers. If the project is not completed, persons unconnected with these proceedings will suffer a very heavy loss, namely the right to have a roof above their heads.

From the evidence, it is clear that the second respondent has taken steps to ensure that the piling work does not cause any further harm to the appellants' apartments. They have constructed an earth berm and taken some other steps. I am convinced that the problem in this case has been principally caused by the piling work. Since that is nearly over, it would be manifestly unjust to quash the decision to rescind the stop work order.

A Judge in a private law action, for example, for an injunction, would be in a much better position to deal with the complaints raised by the appellants and with the kind of supervisory remedy Haji Sulaiman has proposed. While the powers of this Court in public law remedy cases are very wide, great caution must be taken in exercising them. In this context, I remind myself of the caveat neatly formulated in two works on the subject.

The first is Justice Banerjee's work entitled *"Writ Remedies"* (1995 Edn.), p. 113 where the learned author says:

> This (meaning *certiorari*) is a discretionary remedy and is not a matter of right. It will be granted or denied according to all the circumstances of each particular case, as the ends of justice may require and in accordance with sound public policy. One of the factors that the Court may have to consider and which may affect the grant of the remedy, is the availability to the applicant of another remedy which is equally convenient, beneficial and effective.

The second passage appears in the treatise on *"Administrative Law"* by Craig, 3rd Edn., p. 596:

> We have already seen that the Courts exercise discretion in deciding whether to grant a remedy or not, and that they take into account a variety of factors, including: waiver, bad faith, the premature nature of the application, the absence of any injustice, the impact on third parties and the administration, and whether the decision would have been the same irrespective of the error.

Finally, the Federal Court has in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1996] 4 CLJ 687 recognised the accuracy of the statements appearing in the foregoing works. For completeness we cite the following passage from the judgment in that case:

> The answer to the second submission is this. The reasons given by the Industrial Court for the decision it reached are not in truth erroneous. In any event, assuming for a moment that the Industrial Court had given wrong reasons for holding that the appellant is a workman within the Act – and we hasten to repeat that this is not the case here – its ultimate decision being correct, prerogative relief whether in the form of *certiorari* or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-taker.
>
> The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 at p. 429:
>
> > That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Art. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and *one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be*

> *turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense,* for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case. (Emphasis added.)

I ask myself the question: where does the justice of the present case lie? I find that the answer is that it lies in refusing the remedy rather than in granting it. The appellants are not without any remedy because of the view I take of the matter. Their private law remedy in this case is far more efficacious and will produce the result which they desire.

In my judgment, the learned Judge was correct in dismissing the application for *certiorari* on the ground that substantive *locus standi* was wanting. I am also in agreement with the arguments of Mr. Thomas that the practicalities of the present case do not warrant the application of the doctrines of procedural fairness or legitimate expectation. In my view, Mr. Thomas's argument that the application of these doctrines will produce injustice is correct.

For these reasons, and those advanced by Counsel for the respondents both here and in the Court below, I would dismiss the appeal and uphold the orders made by the learned Judge, but I will invite argument on the question of costs both here and in the Court below.

Ahmad Fairuz JCA:

I concur with the judgment given by my learned brother and have nothing to add.

Denis Ong JCA:

I also concur with the judgment given by my learned brother.

ORDER

The appeal is dismissed. All orders by the learned Judge save as to costs are affirmed. After hearing argument on costs, the order as to costs in favour of the second respondent in the Court below is set aside. There will be no order as to costs in all proceedings. All orders as to costs made against the appellants in the Court below are discharged.

Reported by Michele Saw